

## SELECTED EXCERPTS: WHISTLEBLOWING STATUTORY PROTECTIONS

### **50 U.S.C. Section 3234, Prohibited personnel practices in the intelligence community**

[Includes changes from S. 139, the FISA Amendments Reauthorization Act of 2017 (January 19, 2018)]

#### **(a) Definitions**

##### **(3) Personnel action**

The term “personnel action” means, with respect to an employee in a position in a covered intelligence community element (other than a position excepted from the competitive service due to its confidential, policy-determining, policymaking, or policy-advocating character), or a contractor employee—

- (A) an appointment;
- (B) a promotion;
- (C) a disciplinary or corrective action;
- (D) a detail, transfer, or reassignment;
- (E) a demotion, suspension, or termination;
- (F) a reinstatement or restoration;
- (G) a performance evaluation;
- (H) a decision concerning pay, benefits, or awards;
- (I) a decision concerning education or training if such education or training may reasonably be expected to lead to an appointment, promotion, or performance evaluation; or
- (J) any other significant change in duties, responsibilities, or working conditions.

**(4) CONTRACTOR EMPLOYEE.**—The term ‘contractor employee’ means an employee of a contractor, subcontractor, grantee, subgrantee, or personal services contractor, of a covered intelligence community element. **[NEW IN 2018]**

#### **(b) AGENCY EMPLOYEES.**

Any employee of an agency who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or fail to take a personnel action with respect to any employee of a covered intelligence community element as a reprisal for a lawful disclosure of information by the employee to the Director of National Intelligence (or an employee designated by the Director of National Intelligence for such purpose), the Inspector General of the Intelligence Community, the head of the employing agency (or an employee designated by the head of that agency for such purpose), the appropriate inspector general of the employing agency, a congressional intelligence committee, or a member of a congressional intelligence committee, which the employee reasonably believes evidences—

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- (1) a violation of any Federal law, rule, or regulation; or
- (2) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

#### **(c) CONTRACTOR EMPLOYEES. [NEW IN 2018]**

(1) Any employee of a contractor, subcontractor, grantee, subgrantee, or personal services contractor, of a covered intelligence community element who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or fail to take a personnel action with respect to any contractor employee as a reprisal for a lawful disclosure of information by the contractor employee to the Director of National Intelligence (or an employee designated by the Director of National Intelligence for such purpose), the Inspector General of the Intelligence Community, the head of the contracting agency (or an employee designated by the head of that agency for such purpose), the appropriate inspector general of the contracting agency, a congressional intelligence committee, or a member of a congressional intelligence committee, which the employee reasonably believes evidences—

- (A) a violation of any Federal law, rule, or regulation (including with respect to evidence of another employee or contractor employee accessing or sharing classified information without authorization); or
- (B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(2) A personnel action under paragraph (1) is prohibited even if the action is undertaken at the request of an agency official, unless the request takes the form of a nondiscretionary directive and is within the authority of the agency official to request. [NEW IN 2018]

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### 50 U.S.C. Section 3341, Security clearances

[Includes changes from S. 139, the FISA Amendments Reauthorization Act of 2017 (January 19, 2018)]

#### (j) Retaliatory revocation of security clearances and access determinations

##### (1) In general

Agency personnel with authority over personnel security clearance or access determinations shall not take or fail to take, or threaten to take or fail to take, any action with respect to any employee's security clearance or access determination in retaliation for—

- (A) any lawful disclosure of information to the Director of National Intelligence (or an employee designated by the Director of National Intelligence for such purpose) or the head of the employing agency (or employee designated by the head of the agency for such purpose) by an employee that the employee reasonably believes evidences—
  - (i) a violation of any Federal law, rule, or regulation; or
  - (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;
- (B) any lawful disclosure to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee reasonably believes evidences—
  - (i) a violation of any Federal law, rule, or regulation; or
  - (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;
- (C) any lawful disclosure that complies with--
  - (i) subsections (a)(1), (d), and (h) of section 8H of the Inspector General Act of 1978 (5 U.S.C. App.);
  - (ii) subparagraphs (A), (D), and (H) of section 3517(d)(5) of this title;
  - (iii) subparagraphs (A), (D), and (I) of section 3033(k)(5) of this title; and
- (D) if the actions do not result in the employee or applicant unlawfully disclosing information specifically required by Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs, any lawful disclosure in conjunction with--

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- (i) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;
- (ii) testimony for or otherwise lawfully assisting any individual in the exercise of any right referred to in clause (i); or
- (iii) cooperation with or disclosing information to the Inspector General of an agency, in accordance with applicable provisions of law in connection with an audit, inspection, or investigation conducted by the Inspector General.

**(8) INCLUSION OF CONTRACTOR EMPLOYEES.**—In this subsection, the term ‘employee’ includes an employee of a contractor, subcontractor, grantee, subgrantee, or personal services contractor, of an agency. With respect to such employees, the terms ‘employing agency’ shall be deemed to be the contracting agency. **[NEW IN 2018]**

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**10 U.S.C. Section 1034, Protected communications; prohibition of retaliatory personnel actions**  
[Current as of March 6, 2018]

(a) RESTRICTING COMMUNICATIONS WITH MEMBERS OF CONGRESS AND INSPECTOR GENERAL PROHIBITED.—

(1) No person may restrict a member of the armed forces in communicating with a Member of Congress or an Inspector General.

(2) Paragraph (1) does not apply to a communication that is unlawful.

(b) PROHIBITION OF RETALIATORY PERSONNEL ACTIONS.—

(1) No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing—

(A) a communication to a Member of Congress or an Inspector General that (under subsection (a)) may not be restricted; or

(B) a communication that is described in subsection (c)(2) and that is made (or prepared to be made) to—

(i) a Member of Congress;

(ii) an Inspector General (as defined in subsection (i)) or any other Inspector General appointed under the Inspector General Act of 1978;

(iii) a member of a Department of Defense audit, inspection, investigation, or law enforcement organization;

(iv) any person or organization in the chain of command;

(v) a court-martial proceeding; or

(vi) any other person or organization designated pursuant to regulations or other established administrative procedures for such communications; or

(C) testimony, or otherwise participating in or assisting in an investigation or proceeding related to a communication under subparagraph (A) or (B), or filing, causing to be filed, participating in, or otherwise assisting in an action brought under this section.

(2) (A) The actions considered for purposes of this section to be a personnel action prohibited by this subsection shall include any action prohibited by paragraph (1), including any of the following:

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- (i) The threat to take any unfavorable action.
- (ii) The withholding, or threat to withhold, any favorable action.
- (iii) The making of, or threat to make, a significant change in the duties or responsibilities of a member of the armed forces not commensurate with the member's grade.
- (iv) The failure of a superior to respond to any retaliatory action or harassment (of which the superior had actual knowledge) taken by one or more subordinates against a member.
- (v) The conducting of a retaliatory investigation of a member.

(B) In this paragraph, the term "retaliatory investigation" means an investigation requested, directed, initiated, or conducted for the primary purpose of punishing, harassing, or ostracizing a member of the armed forces for making a protected communication.

(C) Nothing in this paragraph shall be construed to limit the ability of a commander to consult with a superior in the chain of command, an inspector general, or a judge advocate general on the disposition of a complaint against a member of the armed forces for an allegation of collateral misconduct or for a matter unrelated to a protected communication. Such consultation shall provide an affirmative defense against an allegation that a member requested, directed, initiated, or conducted a retaliatory investigation under this section.

**(c) INSPECTOR GENERAL INVESTIGATION OF ALLEGATIONS OF PROHIBITED PERSONNEL ACTIONS.—**

(1) If a member of the armed forces submits to an Inspector General an allegation that a personnel action prohibited by subsection (b) has been taken (or threatened) against the member with respect to a communication described in paragraph (2), the Inspector General shall take the action required under paragraph (4).

(2) A communication described in this paragraph is a communication in which a member of the armed forces complains of, or discloses information that the member reasonably believes constitutes evidence of, any of the following:

(A) A violation of law or regulation, including a law or regulation prohibiting rape, sexual assault, or other sexual misconduct in violation of sections 920 through 920c of this title (articles 120 through 120c of the Uniform Code of Military Justice), sexual harassment, or unlawful discrimination.

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(B) Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(C) A threat by another member of the armed forces or employee of the Federal Government that indicates a determination or intent to kill or cause serious bodily injury to members of the armed forces or civilians or damage to military, Federal, or civilian property.

(3) A communication described in paragraph (2) shall not be excluded from the protections provided in this section because-

(A) the communication was made to a person who participated in an activity that the members reasonably believed to be covered by paragraph (2);

(B) the communication revealed information that had previously been disclosed;

(C) of the member's motive for making the communication;

(D) the communication was not made in writing;

(E) the communication was made while the member was off duty; and

(F) the communication was made during the normal course of duties of the member.

(i) [sic: should be (j)] DEFINITIONS.—In this section:

(1) The term “Member of Congress” includes any Delegate or Resident Commissioner to Congress.

(2) The term “Inspector General” means any of the following:

(A) The Inspector General of the Department of Defense.

(B) The Inspector General of the Department of Homeland Security, in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy.

(C) Any officer of the armed forces or employee of the Department of Defense who is assigned or detailed to serve as an Inspector General at any level in the Department of Defense.

(3) The term “unlawful discrimination” means discrimination on the basis of race, color, religion, sex, or national origin.